

1 OPP  
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E-Filed On 12/29/06

6 UNITED STATES BANKRUPTCY COURT

7 FOR THE DISTRICT OF NEVADA

8 In re:	)	Case No. BK-S-06-10725 LBR
9 USA COMMERCIAL MORTGAGE	)	Case No. BK-S-06-10726 LBR
COMPANY,	)	Case No. BK-S-06-10727 LBR
10 Debtor	)	Case No. BK-S-06-10728 LBR
11 In re:	)	Case No. BK-S-06-10729 LBR
12 USA CAPITAL REALTY ADVISORS, LLC.	)	Chapter 11
13 Debtor	)	Jointly Administered Under
14 In re:	)	Case No. BK-S-06-10725 LBR
15 USA CAPITAL DIVERSIFIED TRUST	)	
16 DEED FUND, LLC.	)	
17 Debtor	)	
18 In re:	)	Date of Hearing: January 17, 2007
19 USA CAPITAL FIRST TRUST	)	Time of Hearing: 9:30a.m.
DEED FUND, LLC.	)	
Debtor	)	
In re:	)	Affects:
USA SECURITIES, LLC.	)	<input checked="" type="checkbox"/> USA Commercial Mortgage Company
Debtor	)	<input type="checkbox"/> USA Capital Diversified Trust Deed Fund, LLC

Case No. BK-S-06-10725 LBR  
 Case No. BK-S-06-10726 LBR  
 Case No. BK-S-06-10727 LBR  
 Case No. BK-S-06-10728 LBR  
 Case No. BK-S-06-10729 LBR

Chapter 11  
 Jointly Administered Under  
 Case No. BK-S-06-10725 LBR

Date of Hearing: January 17, 2007  
 Time of Hearing: 9:30a.m.

Affects:  
 USA Commercial Mortgage Company  
 USA Capital Diversified Trust Deed Fund, LLC  
 USA Capital First Trust Deed Fund, LLC  
 USA Securities, LLC  
 USA Realty Advisors, LLC  
 All Debtors

20 **OPPOSITION TO USA COMMERCIAL MORTGAGE COMPANY'S**  
 21 **OBJECTION TO PROOF OF CLAIM NO. 784 FILED BY**  
 22 **BINFORD MEDICAL DEVELOPERS LLC**

23 COMES NOW, Creditor, BINFORD MEDICAL DEVELOPERS LLC, ("Binford") by and  
 24 through its attorney, SUSAN WILLIAMS SCANN, ESQ. of the law firm of DEANER, DEANER,  
 25 SCANN, MALAN & LARSEN, and hereby opposes USA Commercial Mortgage Company's  
 Objection to Proof of Claim No. 784 Filed By Binford Medical Developers LLC.

26 USA Commercial Mortgage ("USACM") objects to Binford's Proof of Claim on two  
 27 grounds: (1) USACM contends that it was not obligated to provide further funding under the Side  
 28

1 Agreement because Binford was in default, (2) that Binford's damages are too speculative to be  
 2 allowed at this stage of the proceedings.

3 USACM acknowledges that Binford has filed Adversary proceeding No. 06-01212-LBR,  
 4 Binford Medical Developers LLC vs. USA Commercial Mortgage and Fidelity National Title Group  
 5 (Fidelity National Title Group is named in an interpleader capacity only). USACM has filed an  
 6 Answer and Counterclaim for Declaratory Relief. A Motion for Partial Summary Judgment filed by  
 7 USACM is pending relating to the Declaratory Relief Claim but does not seek a declaration that  
 8 Binford has no claim against USACM (but does not admit the existence of the claim either). This is  
 9 an admission that issues of fact exist in the Adversary proceeding concerning the amount and nature  
 10 of damages.

11 This Court recently allowed the claim of Binford for voting purposes only. The amount of  
 12 Binford's Proof Claim for allowance is subject to further to Court proceedings.

13 **1. Binford was not in default on interest payment; USACM breached first.**

14 USACM argues that Binford defaulted on the loan and as a result, completion of funding is  
 15 excused. This argument fails for two reasons. First, USACM defaulted on the loan not Binford.  
 16 USACM claims that Binford defaulted in May, 2006. That is incorrect. USACM defaulted in  
 17 December and again in April and May when all of the loan funds were due to be deposited in the  
 18 Construction Control Account per Exhibit "C" to the Loan Agreement. A copy of that Exhibit is  
 19 attached to Schmidt Declaration ("Schmidt Declaration") filed in support of Binford's Motion to  
 20 Temporarily Allow Claim of Binford Medical Developers LLC for Voting Purposes and attached  
 21 hereto as Exhibit "1" and incorporated by reference herein. USACM admits that it failed to disburse  
 22 Binford's last draw request.

23 Exhibit "C", the Disbursement Schedule, provides that all but \$62,000.00 of the loan  
 24 proceeds would have been funded by month seven and all of the loan proceeds by month nine.  
 25 USACM contends that Binford was in breach of the Loan Agreement by failing to pay interest before  
 26 USACM's obligation to fully fund the loan arose. The facts show this is incorrect. The loan began  
 27 funding in September of 2005. Accordingly, by April of 2006, all but \$62,000.00 should have been

1 funded. Attached hereto as Ex. "2" is a table comparing USACM's actual funding against the  
 2 Distribution Schedule. USACM failed to deposit the \$783,854 due in April, 2006. Previous funding  
 3 benchmarks were not met. The remaining \$62,000.00 should have been funded by no later than  
 4 June, 2006. Binford was current on its interest through June 1, 2006 as shown by copies of  
 5 USACM's monthly billing summary for the month of April and May of 2006. These are attached  
 6 hereto as Exhibit "3". Exhibit 2 shows the shortfall in funding, which totals \$925,000.00.

7 As shown by the Schmidt's Declaration attached hereto as Exhibit "4", the failure to fund the  
 8 remaining \$925,000.00 has had serious consequences for Binford's project. Binford is every bit as  
 9 much a victim in this case as the Direct Lenders.

10 USACM also now argues that Binford defaulted first on May 12, 2006, because it had  
 11 insufficient funds to complete the project and pay interest. The reason there were insufficient funds  
 12 to complete the project in the draw account was due to USACM's prior failure to fund. USACM  
 13 now attempts to use its own default to argue that it is entitled pursuant to paragraph 6.7(b) to  
 14 terminate further disbursements. The party which is in itself in breach cannot put the other party in  
 15 breach of the contract. *Young Electric Sign Company v. Fohrman*, 86 Nev. 185, 188, 466 P.2d 846  
 16 (1970).

17 Not only did USACM agree to fund the project, but it agreed to make sure that the contractor  
 18 was paid. The Lenders, through USACM as its agent, USACM, Binford and Smith Development  
 19 and Construction Company entered into an Agreement whereby the contractor would be paid from  
 20 undisbursed construction funds in the event of Binford's default. USACM is in breach of this  
 21 contract by not causing the \$330,000.00 still in escrow at Fidelity to be disbursed to the contractor.

22 **2. The Damages Are Not Too Speculative.**

23 11 USC §502(b) provides that when an objection is made, the Court will hear and determine  
 24 the amount of the claim

25 "...except to the extent that -  
 26 (1) such claim is unenforceable against the debtor and property of  
     the debtor, any agreement or applicable law **for a reason other than**  
     **such claim is contingent or unmatured;** (emphasis added).  
 27

• • •

• • •

... (c) There shall be estimated for purpose of allowance under this section-

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

The Court has already gone through an estimation process for the Binford claim in relation to voting. Binford submits that a similar process can take place under 11USC §502(c)(1). Alternatively, the claim can simply be liquidated through the Adversary proceeding now pending.

## CONCLUSION

9       Based on the fact that the claim can be estimated pursuant to 502(c) and that USACM  
10 breached the Agreement, Binford requests that the objection to its Proof of Claim be denied and that  
11 the Claim be estimated and allowed for purposes of distribution.

DATED this 28th day of December, 2006

Respectfully Submitted,

**DEANER, DEANER, SCANN,  
MALAN and LARSEN**

By:

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Attorneys for Plaintiff  
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1  
2                   **CERTIFICATE OF MAILING**

3                   I hereby certify that service of the above and foregoing OPPOSITION TO USA  
4 COMMERCIAL MORTGAGE COMPANY'S OBJECTION TO PROOF OF CLAIM NO. 784  
5 FILED BY BINFORD MEDICAL DEVELOPERS LLC was made this 28th day of December, 2006,  
6 by depositing a copy of the same in the United States mail in Las Vegas, Nevada, postage-prepaid,  
7 addressed to the following:

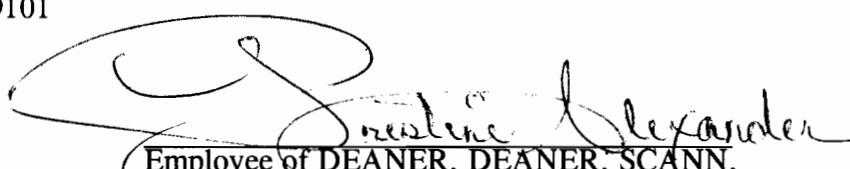
8  
9                   **DEBTOR AND COUNSEL**

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20                  USA Commercial Mortgage  
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23                  USA Capital First Trust Deed Fund, LLC  
24                  USA Securities, LLC  
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32                    
33                  Employee of DEANER, DEANER, SCANN,  
34                  MALAN & LARSEN

35  
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